IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8790 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

CHANSAMA TALUKA PANCHAYAT

Versus

SULEMANBHAI SUJATBHAI MALEK C/O GENERAL WORKERS UTTAR

Appearance:

MR HS MUNSHAW for Petitioner

MR PH PATHAK for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 04/05/2000

ORAL JUDGEMENT

Learned advocate Mr. Munshaw is appearing for the petitioner and learned advocate Mr. Pathak is appearing for the respondent workman. Inthis petition, while issuing rule, this court has granted ad interim

relief against the operation of the impugned award and has issued notice as to interm relief which was made returnable on 9.12.1999. In response to the notice issued by this court, the respondent has appeared and has filed his affidavit in reply to the present petition. Today, the matter was taken up for final hearing with the consent of the parties.

In this petition, the petitioner has challenged the impugned award passed by the labour court, Kalol in reference NO. 170 of 1995 dated 7.6.1999 wherein the labour court has granted reinstatement with continuity of service and with full back wages with all consequential benefits. Brief facts leading to the filing of this petition are that the respondent was working with the petitioner as bore operator with effect from 16.11.1968 and his service was terminated videorder dated 22.2.1995 after complying with the provisions of sec.25F of the ID Act, 1947.At the time of terminating the services of the respondent workman, the petitioner has paid retrenchment compensation of Rs. 40,066.00 and one month's notice pay of Rs. 3082.00 and last month's pay of Rs. 3082.00 by demand draft dated 22.2.1995.

Said order of termination was challenged by the respondent workman before the labour court by filing aforesaid reference which came to be decided by the labour court vide impugned award as aforesaid. Feeling aggrieved by the said award, the petitioner has approached this court by way of this petition.

I have heard the learned advocates for the parties. I have perused the impugned award passed by the labour court. Before the labour court, the statement of claim was filed by the respondent and reply thereto was filed by the petitioner at Exh. 7 and, thereafter, the respondent workman has psroduced certain documents vide Exh. 9 and the petitioner has produced certain documents vide Exh. 8 which were exhibited as Exh. 14 to 20 and, thereafter, the respondent was examined at Exh. 10 and the petitioner has examined Prahladbhai Somabhai and, thereafter, thelabour court has examined merits of the matter and has come to the conclusion that the services of the respondent was terminated because of his remaining absent from service without prior permission which amounts to misconduct and before that, no departmental inquiry was initiated against the respondent and junior to the petitioner was retained in service by the petitioner and in view of such conclusion, the labour court has held that the impugned order of termination is contraryto the principles of natural justice and it was

observed that mere payment of notice pay and retrenchment compensation would not cure the aforesaid defects. The labour court has observed that it is not a simple termination but a termination based on charge of remaining absent without permission which is stigmatic and, therefore, such termination cannot be effected without initiating departmental inquiry and, therefore, the labour court has set aside the saidorder of termination and has directed thepetitioner to reinstate the respondent in service with full back wages and with all other consequential back wages.

Learned advocate Mr. Munshaw has submitted that the respondent was in habit of remaining absent for which he was served with one notice dated 17.7.1989 and letter dated 20.7.1989 was also communicated to the executive Engineer by the Deputy Executive Engineer in respect of the conduct of the responsible workman. He has submited that the respondent was served with one show cause notice dated 21.5.1993 for his remaining absent and ultimately, one annual increment of the respondent was stopped withpermanent effect vide order dated 24.8.1993. Thereafter, again on 18.4.1994, show cause notice was served to the respondeent workman by the Deputy Executive Engineer in respect of negligence and misbehaviour and remaining absent without prior permission of the authority concerned. He has submitted that the another show cause notice dated 31.5.1994 has also been served to the workman for his committing such similar type of misconduct and ultimately, considering the note of the department dated 21.2.1995, the decision was taken by the petitioner to terminate the respondent's services for his remaining absent for the period from 26th March, 1993 to 31st August, 1993 without prior permission of the competent authority of the petitioner and ultimately, it was decided to terminate his service after complying with the provisions of sec.25F of the ID Act. He has submitted that there is noneed to initiate the departmental proceedings because on each and every occasion, show cause notice was served to the delinquent-respondent workman. He has submitted that, no doubt, before terminating his services on the ground of his remaining absent, no departmental inquiry was initiated by the petitioner against the respondent workman.

On the other hand, learned advocate Mr.Pathak appearing for the respondent workman has submitted that the labour court has given detailed reasons in support of the conclusions drawn by it. He has further submitted that the decision of the labour court is in accordance

with the decision of the apex court and, in such a situation, the view taken by the labour court cannot be assailed. According to him, this court, while exercising the powers under Article 226 and/or 227 of the Constitution of India, is having very limited scope of interference and it cannot act as a court of appeal while appreciating the findings and evidence led before the labour court. He has submitted that on each and every occasion, the respondent workman has asked for leave and it was duly sanctioned by the department but with a mala fide intentions, his services were terminated without holding departmental inquiry against the respondent workman. According to him, if he would have been given an opportunity to show cause as to why such an action should not be taken, he would have been able to point out and demonstrate that such action should not be taken and since such opportunity has not been given to him, the action is in violation of the principles of natural justice and therefore, the view taken by the labour court should not be disturbed by this court while exercising the powers under Article 226 and/or 227 of the Constitution of India.

I have considered the submissions made by the learned advocates for the respective parties. I have also perused the impugned award passed by the labour court. I am of the view that the reasons given by the labour court are quite reasonable and in accordance with law. It is an admitted fact that the order dated 22.2.1995 has been passed on account of respondent remaining absent without prior permission for 11 months. Thus, in the impugned order of termination itself, misconduct has been alleged. However, though such misconduct has been alleged, no departmental inquiry was initiated and no reasonable opportunity was given to the respondent to show cause as to why such an action should not be taken. The labour court was, therefore, right in holding that it is not a simple termination as contended by the petitioner. The labour court was, therefore, also right in holding that in such a situation, the petitioner ought to have initiated departmental inquiry against the respondent before taking such an action. In view of such conclusions, the labour court was also right in setting aside the impugned termination order and in directing the petitioner to reinstate the respondent in service.

The law on this aspect is settled. In case of Dipti Prakash Banerjee versus National Centre for Basic Sciences, Calcutta reported in 1999 SCC Lab. & Service page 596, it has been observed by the apex court that it is true that the apex court in some of the cases has held

that the termination order is not punitive where an employee has been given suitable warning and has been advised to improve himself or where he has been given long rope by way of extension of probation. However, in all such cases where simple orders of termination do not contain any word amounting to stigma but there is stigmatic word in the impugned order which cannot be ignored because it will have effect on the appellant's future. Stigma need not be contained in the order but may also be contained in an order or proceedings on the basis of which the order has been passed. The apex court, in case of VP Ahuja versus State of Punjab and others reported in 2000 AIR SCW 792, has observed that the probationer or temporary servant is also entitled to certain protection and his services cannot be terminated arbitrarily, without complying with the principles of natural justice. The apex court has observed that the termination founded on the ground that the probationer had failed in performing his duties is, ex facie, stigmatic and such an order on the face of it is stigmatic and such order should not be passed without holding regular departmental inquiry while giving reasonable opportunity to the delinquent. The plea that the probationer cannot claim any right on the post as his services would be liable to be terminated at any time during the probation period without notice as set out in the letter of appointment cannot be countenanced. In case of Nar Sing versus Union of India and others reported in 2000 AIR SCW 1141, the apex court has considered two aspects one of which is that the retrenchment compensation under section 25F has been paid to the respondent workman concerned and the same has been encashed by the workman does not debar the workman from challenging the order of termination being violative of the fundamental right or constitutional right. The apex court has also observed that the termination of service on the basis of some incident by paying retrenchment compensation and the order passed on the basis of preliminary inquiry and not on the basis of regular departmental inquiry without issuing chargesheet or giving opportunity of hearing being punitive in nature, is liable to be set aside. I have also considered the apex court's decision in case of Gujarat Steel Tubes Ltd. versus Gujarat Steel Tubes Mazdoor Sabha reported in AIR 1980 SC 1896. In the said decision, in paragraph 53 on page 1911 of the report, the apex court has observed and held as under:

"53. Masters and servants cannot be permitted to play hide and seek with the law of dismissals and the plain and proper criteria are not tobe

> misdirected by terminological over ups or by appeal to physic processes but must be grounded on the substantive reason for the order whether disclosed or undisclosed. The court will find out from other proceedings or documents connected with the formal order of termination what the true ground for the termination is. If, thus scrutinized, the order has a punitive flavour in cause or consequence, it is dismissal. If it falls short of this test, it cannot be called a punishment.To put it slightly differently, a termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the service of the delinquent servant, it is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case the grounds are recorded in a different proceeding from the formal order does not detract from its nature.Nor the fact that after being satisfied of the guilt, the master abandons the enquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service the conclusion is dismissal, even if full benefits as on simple termination, are given and non injurious terminology is used."

If the aforesaid principles laid down by the apex court in case of Gujarat Steel Tubes Ltd. (supra) are kept in mind while appreciating the impugned award passed by the labour court and while appreciating the facts and circumstances of the present case, certainly, the impugned order cannot be treated to be simple order of termination and/or retrenchment as alleged by the petitioner. I am, therefore, of the view that the labour court was right in passing the impugned award of reinstatement of the respondent workman. Therefore, in view of the aforesaid legal position, I am of the view that the impugned award passed by the labour court does not require any interference of this court while exercising the powers under Article 226 and/or 227 of the Constitution of India.

At last, learned advocate Mr.Munshaw has submitted that the service of the respondent workman was terminated by order dated 22nd February, 1995 and the labour court has passed the impugned award of reinstatement on 7th June, 1999. He has therefore submitted that the petitioner is a Gram Panchayat which is a 'State' within the meaning of Article 12 of the

Constitution of India and if this Court is ultimately confirming the impugned award, at least, this court should pass some appropriate orders as regards back wages for the intervening period so that the petitioner is not burdened with the back wages. He has further submitted that the amount of Rs. 46,230.00 which has been paid to the respondent workman by way of retrenchment compensation should be directed to be adjusted against the back wages. He has further submitted that he is making these submissions without prejudice to the contentions raised by him about the legality and validity of the impugned award passed by the labour court.

I have considered these submissions made by learned advocate Mr. Munshaw for the petitioner panchayat. In response to these submissions made by Mr.Munshaw, learned advocate Mr. Pathak has fairly submitted this this Court may pass appropriate orders as regards back wages while confirming reinstatement of the respondent workman. He has submitted that this Court may deny 25% of the back wages for the intervening period while confirming the reinstatement. He has further submitted that the respondent workman has no objection if the amount of retrenchment compensation of Rs.46,230.00, if it is paid to the respondent by the petitioner as alleged, may be adjusted against the payment of back wages for the intervening period. I have considered the submissions made by the learned advocates for the parties. The approach of learned advocate Mr. Pathak is quite just and reasonable. In right spirit, he has accepted the request of the learned advocate Mr. Munshaw. Therefore, the impugned award does not call for any interference in so far as reinstatement of the respondent workman with all consequential benefits and continuity of service is concerned. However, in so far as the back wages are concerned, on the basis of the consent given by learned advocate Mr. Pathak, the impugned award requires modification by holding that the workman is entitled to 75% of the back wages for the intervening period by denying 25% of the back wages. To that extent, the impugned award passed by the labour court is required to be modified. Accordingly, it is modified as under:

The petitioner is directed to reinstate the respondent workman in service with continuity of service and with all consequential benefits and with 75% of the back wages for the intervening period from 22.2.1995 till the date of award dated 7.6.1999. The respondent is entitled to full wages from the date of the award till the date of his actual reinstatement in service. Therefore, the present petition is partly allowed. Rule

is made absolute in terms indicated hereinabove. There shall be no orderas to costs.

The petitioner is accordingly directed to implement the impugned award as modified by this court by reinstating the respondent in service within four weeks from the date of receipt of certified copy of this order. The petitioner is further directed to pay 75% of the back wages to the respondent workman for the intervening period from 22.2.1995 to 7.6.1999 after deducting the amount of retrenchment compensation of HRs.46,230.00 within six weeks from the date of receiptof certified copy of this order. The petitioner is further directed to pay full wages to the respondent from the date of the award 7.6.1999 till the actual reinstatement of the respondent workman within six weeks from the date of receipt of this order.

4.5.2000 (H.K.Rathod,J.)

Vyas